SUPREME COURT, U.S.

No. 701

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

ERNEST KLEIN,

Petitioner,

v.

WALSTON & CO., INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS IN THE STATE OF NEW YORK.

BRIEF FOR WALSTON & CO., INC. IN OPPOSITION.

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INDEX.

	PAGE
JURISDICTION	1
QUESTIONS PRESENTED	2
STATEMENT	2
ARGUMENT	4
CONCLUSION	6

Table of Cases.

	PAGE
Anderson National Bank v. *Luckett*, 321 U. S. 233 (1944)	5
Drawdy Investment Co. v. *Leonard*, 261 F. 2d 226 (5th Cir. 1958)	5
Rust Land and Lumber Co. v. *Jackson*, 250 U. S. 71 (1919)	4

Statutes and Authorities Cited.

Constitution of the State of New York, Article 6, Section 7(6)(b)	4
28 U. S. C. Section 1257(3), 2102(c)	1

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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Jurisdiction.

The order of the Court of Appeals of the State of New York which is sought to be reviewed herein was made on September 27, 1962. The petition for a writ of certiorari was filed on December 28, 1962, ninety-two (92) days thereafter. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) and 28 U. S. C. 2101(c), erroneously cited by petitioner as 2102(c).

Questions Presented.

I. **Whether this Court has jurisdiction to review an order made by the Court of Appeals of the State of New York in a civil action, more than ninety days before the petition for certiorari was filed?**

II. **Whether or not the Court of Appeals of the State of New York correctly interpreted its powers and whether an erroneous interpretation of its powers would constitute a violation of the due process clause of the Fourteenth Amendment?**

III. **Whether the Trial Court gave petitioner adequate opportunity to present his defense?**

Statement.

Petitioner, who had victimized thirteen different brokerage houses (R. 171)* was sued by Walston & Co. in two actions for a loss of approximately $13,000.00 (R. 761-762), which it sustained as a result of petitioner's failure to pay for stock which he ordered in his name and in the name of another (R. 770).

In the midst of trial, on April 4, 1961, petitioner voluntarily withdrew his answers and consented to entry of judgment in both actions. His consent was voluntary and came after an 11 day adjournment during which he had ample opportunity to consider his decision (R. 369). Throughout these proceedings, he was represented by

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* References are to folios in the Printed Papers on Appeal.

competent counsel who withdrew only after petitioner voluntarily consented to the entry of judgment.

On May 22, almost two months later, and more than a month after petitioner had retained new counsel, Messrs. Slater & Wolf, Esqs., Judge Geller granted petitioner's motion to vacate his consent. On May 26, 1961, the day set for the continuance of the trial, petitioner, through his attorney, Mr. Abraham Slater, refused to proceed (R. 492). The Court offered Mr. Slater another week's adjournment (R. 522, 529), but he declined, claiming he needed an additional month to hire new counsel. Counsel already in the case continued, and petitioner was given another opportunity to defend on June 1, 1961, when he defaulted (R. 550, 551). An inquest was held on June 1, 1961, and orders were entered on June 6, 1961, modifying the amounts of the consent judgments entered on April 7, 1961. The petitioner's motion to vacate the June 6th orders was denied on June 23, 1961.

On April 26, 1962 the Appellate Division of the Supreme Court unanimously affirmed the orders entered May 22, 1961, June 6, 1961, and June 23, 1961. Motions for reargument were denied on May 29, 1962, as were motions for leave to appeal to the Court of Appeals. The Court of Appeals itself denied leave to appeal on September 27, 1962.

Argument.

I.

This Court does not have jurisdiction to entertain the Petition because more than ninety days expired between the entry of the order sought to be reviewed, and the filing of the Petition. *Rust Land and Lumber Co.* v. *Jackson,* 250 U. S. 71 (1919).

II.

The Court of Appeals properly denied petitioner's motion for leave to appeal. The only possible authority for an exercise of jurisdiction is contained in Article 6, Section 7(6)(b) of the Constitution of the State of New York. This Section does not bestow an absolute right to appeal to the Court of Appeals, but gives the Court discretion to hear appeals "when required in the interests of substantial justice."

The order appealed from shows compliance with Section 7(6)(b) for the Court denied leave to appeal from the non-final orders of May 22, 1961, and June 23, 1961 "upon the ground that the orders sought to be appealed from do not finally determine the actions within the meaning of the Constitution, • • •", and thereafter provided, "that the said motion for leave to appeal be and the same hereby is, in all other respects, denied."

Clearly, the last portion of the order of the Court of Appeals refers to that portion of the petitioner's motion for leave to appeal relating to the June 6, 1961 order, and

constitutes a provident exercise of the Court's discretion to refuse to entertain the appeal because an appeal would not be "in the interest of substantial justice."

Even if petitioner were correct in his contention that the decisions of the Courts of the State of New York were wrong, "That does not invest this Court with jurisdiction to review those decisions." *Drawdy Investment Co.* v. *Leonard,* 261 F. 2d 226 (5th Cir. 1958).

III.

Petitioner was given an adequate opportunity to present his defense.

As previously indicated, when ably represented by competent counsel, in the midst of trial, petitioner voluntarily consented to the entry of judgment against him. At this point, the requirements of due process had been met. He had been given a fair opportunity to present his defense. *Anderson National Bank* v. *Luckett,* 321 U. S. 233 (1944); *The Drawdy Investment Company* v. *Leonard, supra.* He voluntarily waived his right to a continued hearing on the merits.

The petitioner's subsequent machinations were all addressed to the discretion of the Court. This discretion was exercised in petitioner's behalf and afforded him additional opportunities to present his case on May 26, 1961 and on June 1, 1961. He not only did not avail himself of these opportunities by defaulting, but specifically rejected the Court's offer to give him another week. Due process requires no more than an opportunity to be heard. *A fortiori* due process has been observed when three opportunities have been provided.

Conclusion.

This Court does not have jurisdiction to entertain the Petition, but even if it did, the decision below turns on purely factual issues and presents no question of general interest warranting review by this Court. The Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
January 23, 1963.

Respectfully submitted,

WILLIAMSON PELZ, JR.,
Counsel.